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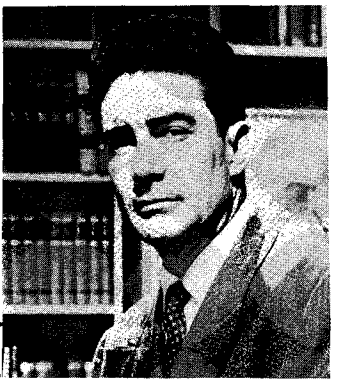

DAN SMOOT

A LAWLESS SOCIETY

In a speech at St. Petersburg, Florida, on September 15, 1964, Senator Barry M. Goldwater blamed the Supreme Court for the rising tide of crime in the United States, saying the Court has stretched the meaning of the Fourteenth Amendment to deny states the power to punish crime. He criticized Supreme Court decisions requiring state courts to follow federal rules of evidence, specifically mentioning the Mallory Case decision.(1)

The Senator said criminals are being needlessly pampered and that law and order are being sacrificed "just to give criminals a sporting chance to go free." He promised, if elected, to appoint federal judges who would "redress constitutional interpretations in favor of the public." If this proved ineffective, he said, he would recommend a constitutional amendment to give back to the states "those powers absolutely necessary for fair and efficient administration of criminal law" — and promised to urge Congress to change some of the rules of procedure in federal courts.(1)

Senator Goldwater accused "highest executive officers" of the Johnson administration of encouraging individual and mob violations of law, citing specifically a remark by Adlai E. Stevenson (U. S. Ambassador to the United Nations). In a commencement address to Colby College at Waterville, Maine, on June 7, 1964, Ambassador Stevenson praised "student demonstrators [who] have been toppling governments all over the world in the last few years." Stevenson said:

"Happily for us, students have not tried to overthrow the Government of the United States, but they certainly are making their views felt in public affairs.

"I think especially of the participation of American students in the great struggle to advance civil and human rights in America.

"Indeed, even a jail sentence is no longer a dishonor but a proud achievement. Perhaps we are destined to see in this law-loving land people running for office not on their stainless records but on their prison records."(2)

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President Johnson displayed approval of law violation as a means of social protest when he sent a message of "love and blessing" to a preacher's wife who was arrested for deliberate violation of a local law against trespassing upon private property.[3]

Arthur Krock, *New York Times* columnist, said Senator Goldwater unfairly imputes to President Johnson responsibility for the quality of the present Supreme Court, because Johnson has no appointee on the Court.[3] (Four of the present Supreme Court justices were appointed by Eisenhower; two by Kennedy; two by Roosevelt; one by Truman.)

Krock conceded, however, that Senator Goldwater had raised a valid issue in "citing the mob violence and rise in crime, for which vote-seeking politicians and doctrinaire judges have a large measure of responsibility." Krock said:

"[Goldwater's] thesis . . . that the shocking rise of serious crimes has been attendant on Federal court decisions reflecting an 'obsessive concern for the rights of the criminal defendant' — is also borne out by the record, particularly in the capital city of the United States. Here the United States Court of Appeals has, in its enthusiasm, so expanded a Supreme Court decision which especially cripples law enforcement, that the underworld operates on the likelihood 'the Judge will let us off.'"[3]

The Supreme Court decision which Arthur Krock refers to here is the Mallory Case decision, the same one that Senator Goldwater specifically mentioned.

The Mallory Case (decided by the Supreme Court in 1957) involved Andrew R. Mallory, a 19-year-old negro who confessed to raping a woman in the cellar of her apartment house (where he caught her while she was doing the family laundry). Mallory was tried and convicted in a Washington District Court. His conviction was upheld by a Court of Appeals.[4]

The conviction was reversed by the Supreme Court in a unanimous opinion written by Justice Felix Frankfurter. The Court did not suggest any doubt about Mallory's guilt. There was no question of police brutality or third-degree treatment. The Supreme Court caused Mallory to be set free and go unpunished for his crime, because the police had questioned him before his formal arraignment. Under the Mallory ruling, Washington police cannot question a suspect before he is formally arrested and arraigned, unless the suspect agrees. If arrested and arraigned, he cannot be questioned without his consent.[4]

When police are prohibited from *questioning* suspects — particularly in such crimes as rape, where material evidence of guilt is often nonexistent or extremely difficult to obtain — police are almost helpless to afford society adequate protection. Within five years after the Mallory decision, robberies in the District of Columbia had increased 115 percent; and other hideous crimes of violence against helpless individuals had become commonplace.[5]

A congressional secretary was stabbed and robbed by a negro while she knelt to pray in St. Peter's Catholic Church on Capitol Hill. The wife of a general was attacked in her bathtub, by a negro who had broken into her home. Two negroes broke into an apartment at midday and attacked the granddaughter of a Washington official. A retired minister's wife was criminally assaulted in her own home. Mrs. Brooks Hays, wife of a Special Assistant to the President, was robbed and injured by a 17-year-old negro who forced his way into her bedroom.[5]

A 79-year-old negro Baptist preacher, living in retirement in Washington, took a stroll in his neighborhood one Saturday evening after dinner. Four young negroes robbed him and beat him to death. The killers got $1.29 — which they spent on cakes and soft drinks immediately after leaving the old man dying on the street. There were several witnesses to the murder, but none offered the old man any help, and none would offer the police any help in positively identifying the murderers.[6]

On March 12, 1963, a 21-year-old negro (with a police record of arrests, convictions, and paroles dating back to 1953) snatched the handbag of a young white woman (a clerk in the Navy Bureau

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of Weapons) who was six-months pregnant. She chased the man for several blocks, calling for help. No one attempted to help in any way — until two policemen heard her cries and saw the man she was following. They cornered the negro, who fought and broke away. One policeman (a rookie) pulled his gun and ordered the negro to halt. The negro kept on running. The policeman fired one shot and killed the man.[7]

A District Coroner's Jury found that the policeman had acted properly in line of duty. The Metropolitan Washington Citizens' Crime Commission commended the officer for "prompt and courageous . . . assistance to a victim of a crime."[7]

But the Washington Chapter of CORE (Congress of Racial Equality) protested this incident as evidence of "police brutality," saying the policeman had "murdered" the negro. The Washington branch of the NAACP (National Association for the Advancement of Colored People) and the Urban League also protested.[7]

Some major churches in Washington bar their doors against all visitors who cannot identify themselves; and women staff workers are warned to admit no one on church properties if there are not enough male staff members present to offer the women protection.[8]

Sex crimes have become so numerous in the nation's capital that police have instituted an escort service for women workers going to and from work at certain times and in certain sections of the city. Some of the sections where this escort service is necessary are around Capitol Hill. Indeed, the Supreme Court has issued an official bulletin, warning women employees to take full advantage of the police escort service.[8]

It is impossible for police to guard and protect all the women of Washington, so many must look to their own protection. Washington stores now sell small tear-gas pens and pocket-size sirens which women can carry in their purses.[8]

A negro arrested for robbing liquor stores in daylight explained he prefers daytime operations because he is afraid to carry money on the streets at night.[8]

The rising tide of crime since the Mallory Case decision in 1957 is by no means confined to Washington, D. C., or to any particular racial group. Testimony of J. Edgar Hoover (FBI Director) before the House Subcommittee on Appropriations on January 29, 1964, revealed that during the five-year period, 1958-1962, crime in the United States increased almost four times faster than the nation's population increased. Mr. Hoover said:

"There were an estimated 2,048,370 serious crimes committed in the calendar year 1962, a 6 percent increase over 1961. On an average, there was a murder, forcible rape, robbery, aggravated assault, burglary, major larceny, or automobile theft every 15 seconds during 1962.

"Preliminary statistics for the calendar year 1963 indicate a continuing upward trend. During the first 9 months of 1963, there was a 10 percent increase in serious crimes over the same period in 1962 . . . ."[9]

The Fifth Amendment to the Constitution says, among other things, that "No person shall be . . . compelled in any criminal case to be a witness against himself." This means that an accused person cannot be forced, in federal court, to testify against himself. It would be a sensible extension of that meaning to hold that an *enforced* confession of guilt, obtained prior to trial, would amount to forcing the accused to testify against himself if his involuntary confession were used as evidence against him in court. The Supreme Court's Mallory Case rule of 1957 stretched the meaning of the Fifth Amendment to declare that a defendant cannot even be questioned prior to formal arrest and arraignment.

The Mallory rule immediately created enormous problems for law enforcement where federal courts are involved. Extension of the Mallory rule to state courts has crippled law enforcement throughout the nation. The extension was achieved by the assumption that the Fourteenth Amendment makes the prohibitions of the Bill of Rights (the first ten constitutional amendments) applicable to state governments as well as to the federal government. This assumption is a distortion not only of the

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Fourteenth Amendment but also of the entire Constitution.

John Marshall, Chief Justice of the Supreme Court from 1801 to 1835, said:

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and compounding the American people into one common mass."(10)

Associate Justice Field, in 1893 (after the Fourteenth Amendment was proclaimed adopted) said (in *Baltimore and Ohio Railway Company vs. Baugh*):

"The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."(10)

In short, it is an oft-reiterated principle that federal courts have no authority to review actions of state courts in cases involving state matters, such as violations of state and local laws. The Earl Warren Court, however, has usurped power to dictate to state courts, to the extent that law and law enforcement in the states are at the mercy of Supreme Court whims.

On March 18, 1963 (in *Fay versus Noia*), the Supreme Court ordered the release from a New York State Penitentiary, on a writ of habeas corpus, of a man who had been incarcerated for 20 years after conviction in state court for the crime of murder. The Supreme Court held that the man's rights under the federal Constitution had been violated because he had not effected an appeal from his conviction in state court. Dissenting in *Fay versus Noia*, Supreme Court Justice Tom Clark said:

"Beyond question the federal courts until today have had no power to release a prisoner in respondent Noia's predicament, there being no basis for such power in either the Constitution or the statute. But the Court today in releasing Noia makes an abrupt break not only with the Constitution and the statute but also with its past decisions, disrupting the delicate balance of federalism so foremost in the minds of the Founding Fathers and so uniquely important in the field of law enforcement. The short of it is that Noia's incarceration rests entirely on an adequate and independent state ground — namely, that he knowingly failed to perfect any appeal from his conviction of murder . . . .

"The Court . . . effectively swings closed the doors of justice in the face of the State, since it certainly cannot prove its case 20 years after the fact . . . .

"There can be no question but that a rash of new applications from State prisoners will pour into the Federal courts, and 98 percent of them will be frivolous . . . . This influx will necessarily have an adverse effect upon the disposition of meritorious applications, for . . . they will be buried in a flood of worthless ones . . . .

"Second, the effective administration of criminal justice in State courts receives a staggering blow. *Habeas Corpus* is in effect substituted for appeal, seriously disturbing the orderly disposition of State prosecutions and jeopardizing the finality of State convictions in disregard of the States' comprehensive procedural safeguards which, until today, have been respected by the Federal courts. Essential to the administration of justice is the prompt enforcement of judicial decrees. After today, State judgments will be relegated to a judicial limbo, subject to Federal collateral attack . . . .

"The rights of the States to develop and enforce their own judicial procedures . . . . are today attenuated if not obliterated in the name of a victory for the 'struggle for personal liberty.' But the Constitution comprehends another struggle of equal importance and places upon our shoulders the burden of maintaining it — the struggle for law and order.

"I regret that the Court does not often recognize that each defeat in that struggle [for law and order] chips away inexorably at the base of that very personal liberty which it seeks to protect . . . ."(10)

Dissenting in *Fay versus Noia*, Supreme Court Justice John Marshall Harlan said:

"This decision, both in its abrupt break with the past and in its consequences for the future,

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is one of the most disquieting that the Court has rendered in a long time . . . .

"The federal courts have no power, statutory or constitutional, to release the respondent Noia from state detention . . . . In what it does today, the Court has turned its back on history and struck a heavy blow at the foundations of our federal system . . . ."[10]

The Fourth Amendment to the Constitution says:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."

This prohibition against unlawful search and seizure, and against the issuance of search warrants without a show of "probable cause" by law officers, applies to the federal government. States have their *own* prohibitions against unlawful search and seizure and against the issuance of warrants on flimsy grounds. Until recently, a person who claimed illegal arrest or illegal search and seizure by state or local officers in connection with a violation of state law could appeal only as high as the supreme court of his state.

In *Mapp versus Ohio* (1961) and *Ker versus California* (1963), the Warren Court held that the Fourteenth Amendment makes the "probable cause" requirements of the Fourth Amendment applicable against states. The results can be illustrated by one case.[11]

In the Brooklyn Heights section of New York, an experienced police captain noticed a young Puerto Rican carrying expensive-looking luggage. He stopped the fellow, who claimed the luggage belonged to a friend. The Puerto Rican got into the police car to go find this "friend," but soon admitted that the "friend" did not exist, and voluntarily confessed that he had stolen the luggage. A County Judge (following the rule laid down by the Supreme Court in *Mapp versus Ohio* and in *Ker versus California*) held that the policeman had arrested the Puerto Rican and seized the luggage without "probable cause." The defendant (who has a long criminal record) will go free unless a higher court reverses the County Judge. If a higher State Court does reverse, the defendant can keep appealing until he reaches the Supreme Court which — if it follows its decisions of 1961 and 1963 — will set him free.[11]

In Florida, a defendant named Gideon was sentenced in state court. The State of Florida has its own procedures to guarantee that a defendant is not denied right to counsel; and federal courts have no constitutional right to review procedures of state courts. Gideon had no counsel at his trial, because he did not want one. He was convicted on a plea of guilty. Later, he appealed to federal courts. In *Gideon versus Wainwright* (March 18, 1963), the U. S. Supreme Court ordered Gideon released from Florida prison, because he had had no lawyer at his trial.[12]

In *Escobedo versus Illinois* (June 22, 1964), the U. S. Supreme Court reversed the state conviction (for murder) of defendant Escobedo, because Escobedo had no lawyer present when he confessed the crime to police officers.[12] This *Escobedo* expansion of the Warren Court's *Gideon* rule is one of the most crippling blows to effective law enforcement that was ever delivered.

Note two significant cases that have already resulted from the Supreme Court's *Gideon* and *Escobedo* decisions: one in Florida and one in California.

In Florida, Wallace Pless (a 65-year-old negro with a criminal record dating from 1917) pleaded guilty in 1956 to the murder of two men. He was sentenced to life imprisonment. After the Supreme Court's *Gideon* decision, he demanded a new trial on grounds that he had no lawyer at the time of his conviction in 1956. Evidence to corroborate his original confession of guilt was no longer available. At his new trial, Pless was convicted, but was released from prison and given five years' probation. While on probation, Pless was arrested and charged with committing two additional murders — at Tallahassee, on September 15, 1964.[13]

In California, Robert B. Dorado, a prisoner at San Quentin, was accused of killing a fellow in-

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mate. While questioning Dorado, prison officials confronted him with the evidence against him. He freely confessed. The following day, he voluntarily signed a written statement confessing the murder. He was convicted, largely on the basis of his confessions. On August 31, 1964, the California State Supreme Court, in *People versus Dorado*, overturned Dorado's conviction, holding that the confessions were not admissible because they were obtained before Dorado was formally arraigned and because his lawyer was not present when he confessed.[12]

The California State Supreme Court based its decision on the U. S. Supreme Court's *Gideon, Escobedo*, and *Massiah* decisions. The Warren Court heard the *Massiah* case earlier in 1964. In this case, defendant Massiah was indicted for violation of federal narcotics laws, and had counsel. After release on bail, he talked with a co-defendant in an automobile. Federal agents, having installed a listening device in the automobile, recorded incriminating statements that Massiah made. These statements were admitted into evidence, and Massiah was convicted. The Supreme Court reversed the conviction, claiming that Massiah had suffered denial of his right "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted, and in the absence of counsel."[12]

The California Supreme Court's decision to reverse the conviction of a confessed murderer, because of U. S. Supreme Court decisions, elicited a grim warning from law enforcement officials. Chief Deputy District Attorney Manley J. Bowler of Los Angeles predicted that a "vast number" of dangerous criminals (some serving prison terms and others facing trial) would be turned loose by the *People versus Dorado* ruling. Pointing out that the great majority of criminal convictions are based on confessions obtained by police officers without a defense lawyer being present, Mr. Bowler said:

"In cases where the district attorney's office had independent evidence and testimony in addition to a confession in prosecuting, re-trial will be ordered.

"But in cases where convictions were obtained principally through confessions, with very little independent evidence, those convicts will have to be set free."[14]

In less than three weeks after the *People versus Dorado* decision, 123 writs of habeas corpus had been received from Chino prison alone. Chino houses convicts from the Los Angeles area. Law officials estimated that 400 inmates of Chino would probably go free under the *People versus Dorado* ruling.[15]

There can be little question that Warren Court pronouncements in connection with mass demonstrations that violate local and state laws, have encouraged mob violence in the United States. In March, 1963, the Warren Court ruled (in the case involving sit-in demonstrators in Columbia, South Carolina) that state and local officials have no authority to stop such demonstrations or to make arrests because "the privilege of free speech is broad." The Court said that free speech may best serve its high purpose when it causes unrest and "stirs people to anger."[16]

In some cases, the Warren Court does not even bother to torture the meaning of the Constitution to find some justification for an edict it wishes to hand down. The Court merely orders something done, ignoring the Constitution, on the presumption, apparently, that the end desired by the Court justifies whatever means it wishes to employ.

On June 22, 1964, for example, the Warren Court overturned the convictions of several sit-in demonstrators. The demonstrators had been tried and convicted under various local and state laws prohibiting trespass on private property. The Court refused to give any constitutional, or other grounds, for overturning the convictions. It simply ordered them overturned. Justices Harlan, Black, and White dissented from this June 22, 1964, decision saying:

"We think that the question should be decided and that the Fourteenth Amendment does not forbid this application of a state's trespass laws . . . to prosecute for crimes committed against a person or his property, however narrow the victim's views may be . . . . Such a doctrine would

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not only be based on a fiction, it would also severely handicap a state's efforts to maintain a peaceful and orderly society.

"Our society has put its trust in a system of criminal laws to punish lawless conduct . . . it would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace.

"[The 14th Amendment] does not prohibit privately owned restaurants from choosing their own customers. It does not destroy what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him otherwise."(17)

In a large number of cases, Supreme Court decisions have placed communists and the communist party above the law.

One illustration: in 1961, the Supreme Court held that the communist party must register, to comply with the Internal Security Act. Communist officials refused to register the party, however, saying they could not do so without incriminating themselves as party members. On June 8, 1964, the Supreme Court held that the communist party cannot be required to comply with the registration provisions of the Internal Security Act, unless some communist official voluntarily chooses to risk self-incrimination by registering the party.(18)

Gus Hall, head of the communist party, said the decision was,

"a major victory for the constitutional liberties of all the American people and an important rebuff to the Goldwater-Birchite conspiracy."(18)

On September 28, 1964, *U. S. News & World Report* published an article by "a Government lawyer who prefers to remain anonymous." The anonymous lawyer quotes Edward L. Barrett, Jr., professor of law at University of California in Berkeley, as saying that recent Supreme Court decisions,

"appear to weaken the protection of the personal liberty of the average law-abiding citizen — even to accord his interest in privacy and property markedly less protection than is accorded to the similar interests of persons suspected of crime."(11)

Surely, the record bears Professor Barrett out. It bears out the statement of U. S. Senator Harry F. Byrd that,

"a continuation of such decisions as those . . . rendered by the present Supreme Court will destroy the very fundamental principles which have made America the greatest Nation in all the world."(19)

The record fully substantiates Senator Goldwater's contention that the Supreme Court has encouraged mob violence and rising crime rates which are a major national disgrace.

Senator Goldwater has promised positive efforts to curb the Supreme Court, which is a foremost threat to liberty in the United States. If President Johnson is elected, the Supreme Court will continue its drive toward total destruction of the American constitutional system.

This difference between the two presidential candidates is one of many which voters should think about and thoroughly discuss before going to the polls this year.

FOOTNOTES

(1) "Goldwater Says He'd Curb Court," by Charles Mohr, *The New York Times,* September 16, 1964, pp. 1, 12

(2) "'A Jail Sentence Is No Longer A Dishonor . . .'," *U. S. News & World Report,* June 22, 1964, p. 12

(3) "In The Nation," by Arthur Krock, *The New York Times,* September 17, 1964, p. 40

(4) *Limitation of Appellate Jurisdiction of the United States Supreme Court,* Hearings before the Internal Security Subcommittee of the U. S. Senate Judiciary Committee, February and March, 1958, pp. 152, 169-70, 199, 233-4, 269, 476

(5) For additional information on crime in Washington, D. C., see this *Report,* "Washington: The Model City," June 24, 1963.

(6) *The Evening Star,* Washington, D. C., April 19, 1963

(7) Remarks of U. S. Representative William B. Widnall (Rep., N. J.), *Congressional Record,* March 18, 1963, pp 4209-11 (daily)

(8) "Washington, D. C. — Portrait of a Sick City," by Fletcher Knebel, *Look* magazine, June 4, 1964

(9) *FBI 1965 Appropriation,* testimony of J. Edgar Hoover before the House Subcommittee on Appropriations, January 29, 1964, pp. 29

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(10) "States Rights," speech by U. S. Senator A. Willis Robertson (Dem., Va.), including dissenting opinions of Justices Clark and Harlan in *Fay versus Noia, Congressional Record,* March 21, 1963, pp. 4406-9 (daily)

(11) "A Government Lawyer Looks At The Crime Problem," *U. S. News & World Report,* September 28, 1964, pp. 74-6

(12) *In the Supreme Court of the State of California, In Bank, The People vs. Robert B. Dorado,* filed August 31, 1964, 19 pp.

(13) AP story from Tallahassee, Florida, *The Dallas Times Herald,* September 16, 1964, p. 16A

(14) "U. S. Rule 'Handcuffs' Police: 44 Cities Ponder New Law," *The Los Angeles Herald-Examiner,* September 3, 1964, p. 1E

(15) "Fear Voiced That 400 At Chino May Go Free," *The Los Angeles Times,* September 19, 1964, Section 1, p. 1

(16) "Preserving Law and Order," by Dick West, *The Dallas Morning News,* July 7, 1963, Section 3, p. 2

(17) AP story from Washington, *The Dallas Morning News,* June 23, 1964, Section 1, p. 12

(18) "U. S. Balked by Court On Registering Reds," by Anthony Lewis, *The New York Times,* June 9, 1964, pp. 1, 21

(19) Remarks of U. S. Senator Harry Flood Byrd (Dem., Va.), *Congressional Record,* July 16, 1957, p. 10675 (daily)

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